

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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OLYMPIC HEALTHCARE SERVICES II, LLC; GALINA BAIDA

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

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**BRIEF OF RESPONDENT**

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## **I. INTRODUCTION**

An adult family home is a small, long term care facility. Pursuant to statute and regulation, each adult family home is only licensed to provide care and services to a maximum of six residents. The Appellant, Galina Baida, owns two adult family homes that provide 24-hour care to vulnerable adults. The Department of Social and Health Services (“DSHS” or “Department”) discovered that Ms. Baida would shift the residents from one adult family home to her second adult family home so that a single caregiver would care for the residents from both facilities at one time. The actions of Ms. Baida resulted in a single caregiver being responsible for more than six, and as many as eleven, residents at one time. Upon discovery of this impermissible behavior, along with a myriad of other violations of the adult family home licensing requirements, the Department revoked one of Ms. Baida’s two adult family home licenses.

Ms. Baida appeals the Department’s detailed, 133-page final agency decision, claiming the revocation of her adult family home license should be overturned because there should be a higher standard of review for adult family home license revocations, the Department’s Review Judge was biased, and there are problems with the conclusions of law in the final agency decision. Ms. Baida also requests attorney’s fees and costs.

This Court should reject the invitation to apply a higher standard of proof in this case because the preponderance of evidence standard is constitutionally appropriate, and the Department's license revocation is supported by the evidence and not arbitrary and capricious. The Department's Review Decision and Final Agency Order should be affirmed.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. Is preponderance of the evidence the proper standard for revocation of an adult family home license?
2. Did the DSHS Board of Appeals Review Judge properly amend the findings of fact and conclusions of law?
3. Is the revocation of one of Ms. Baida's adult family home licenses supported by substantial evidence?
4. Did the Superior Court properly deny the motion for attorney's fees on the basis that Ms. Baida was not a prevailing party and the agency's actions were justified?

## **III. COUNTERSTATEMENT OF THE CASE**

The appellant, Galina Baida, operates two adult family homes located across the street from each other. Agency Record (AR) 31, Finding of Fact (FF) 1. Each home is licensed for a maximum of six adults. RCW 70.128.010(1). The two adult family homes are Olympic Healthcare I and Olympic Healthcare II. Typical staffing in both adult family homes is one caregiver per shift. AR 37, FF 18.

It is undisputed that all of the residents of both Olympic Healthcare I and Olympic Healthcare II were residents of an adult family home who have personal and special care needs. The residents of Olympic Healthcare II all had dementia and were generally frail and elderly. They needed 24-hour care and had high care needs. AR 23, FF 6. The residents of Olympic Healthcare I had varied care needs; they were developmentally disabled and were generally less frail and higher functioning than the residents in Olympic Healthcare II. Regardless, all the residents of Olympic Healthcare I still required 24-hour care and at least four of them had behaviors or care needs requiring heightened supervision or assistance. AR 33, FF 7.

On November 2, 2009, Candace Corey, the Department's complaint investigator, made an unannounced visit to Olympic Healthcare II. When she arrived, there was one caregiver and eight adult family home residents in the home. Six were residents of Olympic Healthcare II, and two were residents from Ms. Baida's other adult family home, Olympic Healthcare I. The caregiver on duty told the complaint investigator that the two residents from the other adult family home had been in Olympic Healthcare II since 7:00 AM. AR 39, FF 23.

At 3:00 PM that same day, two additional residents from Olympic

Healthcare I entered the adult family home that Ms. Corey was investigating. Both residents sat at the dining room table and had snacks. Also at 3:00 PM, a new caregiver arrived and the other caregiver soon left. At approximately 4:30 PM, an additional resident from Olympic Healthcare I arrived. This meant that the single caregiver in Olympic Healthcare II was responsible for eleven adult family home residents. This was the caregiver's second day of training and she was trying to prepare a supper meal. AR 50, FF 48.

Although Ms. Baida told Ms. Corey that having additional residents in the home was unusual, she also admitted that the extra residents were in Olympic Healthcare II because there was no caregiver in Olympic Healthcare I. Ms. Baida stated that, as soon as the caregiver from the other adult family home returned, the residents would go back to their own home.<sup>1</sup> AR 54-55, FF 59.

Contrary to what Ms. Baida told the complaint investigator during the initial investigation, caregivers who worked in Olympic Healthcare II stated that it was a common occurrence for residents of the other adult family home to be there, especially on Saturdays when Ms. Baida and her mother, the caregiver for Olympic Healthcare I, went to Church. AR 50-55, FF 48-61. While the residents of Olympic Healthcare I

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<sup>1</sup> Another caregiver arrived at approximately 5:30 PM. He left with the additional residents at about 6:00 PM. AR 39, FF 23.

sometimes enjoyed being at Olympic Healthcare II, those residents sometimes wanted to be in their own home. AR 52, FF 54. A caregiver described at least one instance where, when a resident from Olympic Healthcare I tried to go home, she had to bring him back to Olympic Healthcare II because there was no caregiver at the other adult family home. AR 52, FF 53.

The caregivers' statements and the complaint investigator's observations were further supported by the observations of the regional ombudsmen, who visited Olympic Healthcare II on November 21, 2009, and also observed residents from Olympic Healthcare I there. AR 53, FF 56. When the regional ombudsman spoke to Ms. Baida to express concern regarding the residents from the other adult family home being at Olympic Healthcare II, she stated that the residents were at Olympic Healthcare II because there was no caregiver at Olympic Healthcare I. AR 44, FF 34.

The observed overcapacity of Olympic Health Care II triggered a more in-depth investigation, which resulted in several different citations of rule violations, including that the facility was operating overcapacity, that there were problems with care and services, and that Ms. Baida failed to understand how to operate an adult family home. AR 720-735. Based on the investigation and the citations, the Department revoked the adult

family home license for Olympic Healthcare II. AR 712-719. Ms. Baida appealed the revocation of her adult family home license to the Office of Administrative Hearings.

After a five day hearing, the Administrative Law Judge (ALJ) issued a 70-page initial decision determining that none of the violations had been committed and reversing the revocation order. AR 185-265. The Department appealed the initial decision to the Department of Social and Health Services' Board of Appeals ("Board of Appeals"). The Board of Appeals review judge reversed the initial order, and reinstated the revocation order in a 133-page Review Decision and Final Order. AR 1-136. Ms. Baida appealed the final agency decision to Lewis County Superior Court, claiming that the preponderance of the evidence burden of proof used was incorrect, that the review judge exceeded her authority, and that the conclusions of law were in error. She challenged none of the findings of fact on judicial review.<sup>2</sup>

The Lewis County Superior Court upheld the Department's Review Decision and Final Order in a letter opinion stating the proper burden of proof for an adult family home license revocation was a preponderance of the evidence, substantial evidence supported the citations, the Board of Appeals review judge's exercise of authority was

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<sup>2</sup> She also conceded that she was not challenging any findings of fact during oral argument. Verbatim Report of Proceedings, pp. 20-24. CP \_\_\_\_.

proper, and the decision to revoke Ms. Baida's adult family home license was an appropriate remedy and not an abuse of the Department's discretion. The Final Order of the Board of Appeals was affirmed in all respects. Clerk's Papers (CP) 357-365.

Ms. Baida has now appealed to this court.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

The matter before this Court is the appeal of a final agency order in an adjudicative proceeding under the Administrative Procedure Act (APA), RCW 34.05. The Court's review authority is limited to a review of the DSHS Board of Appeals' Final Order, not the ALJ's Initial Decision, or the superior court proceedings. *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 403-404, 858 P.2d 494 (1993) (commissioner's decision, not the administrative law judge's, is the one that the court reviews); *Nw. Steelhead & Salmon Council of Trout Unlimited v. Dep't of Fisheries*, 78 Wn. App. 778, 896 P.2d 1292 (1995) (agency head's findings are reviewed, not the administrative law judge's). Therefore, the order under review is the April 8, 2011, Review Decision and Final

Order that upholds the Department's revocation of Ms. Baida's adult family home license.<sup>3</sup> AR 1-135.

The reviewing court applies the APA standards of review directly to the record made before the administrative agency, and it may not consider new evidence. RCW 34.05.558; *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 601, 903 P.2d 433 (1995), *cert. denied*, 518 U.S. 1006 (1996). Ms. Baida has the burden of showing the invalidity of the Final Order. RCW 34.05.570(1)(a); *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 381, 932 P.2d 139 (1997). This Court may grant relief only if it determines that Ms. Baida has been "substantially prejudiced" by the agency's actions. RCW 34.05.570(1)(d); *Peacock v. Public Disclosure Comm'n*, 84 Wn. App. 282, 286, 928 P.2d 427 (1996).

The Court may grant relief from an agency order in an adjudicative proceeding only on the grounds provided under RCW 34.05.570(3).<sup>4</sup> *Tapper* 122 Wn.2d at 402. The Court reviews *de novo* both the agency's conclusions of law and its application of the law

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<sup>3</sup> Throughout her Opening Brief, Ms. Baida functionally asks this Court to reinstate the Initial Decision of the Administrative Law Judge, even though this is not an appropriate request of this Court.

<sup>4</sup> Relief may be granted only if (a) the order or rule on which it is based is unconstitutional; (b) the order exceeds the agency's statutory authority; (c) the decision-making process was unlawful; (d) the agency erroneously interpreted or applied the law; (e) the order is not supported by substantial evidence in light of the whole record before the court; (f) the agency has not decided all issues requiring resolution by the agency; (g) a motion for disqualification should have been granted; (h) the order is inconsistent with the agency's rules; or (i) the order is arbitrary or capricious.



to the facts. *Id* at 402-3. The Court can modify conclusions of law if the agency's review judge "erroneously interpreted or applied the law." RCW 34.05.570(3)(d); *Heinmiller*, 127 Wn.2d at 601. The Court may also substitute its judgment for that of the reviewing officer, but it must accord "substantial weight" to the agency's interpretations of the law within its area of expertise. *Macey v. Empl. Sec. Dep't*, 110 Wn.2d 308, 313, 752 P.2d 372 (1988).

**B. Preponderance Of The Evidence Is The Appropriate Standard For The Board of Appeals to Use In A Hearing Involving The Revocation Of An Adult Family Home License**

The burden of proof standard used by the DSHS Board of Appeals in this adult family home licensing hearing was the preponderance of the evidence standard. This standard means that it is more likely than not that something happened or exists. WAC 388-02-0485. Ms. Baida argues that the application of this lower standard, rather than a clear and convincing evidence standard, violates her due process rights. Regardless of her contentions otherwise, the application of a lower standard of review in this case comports with the Washington Supreme Court's decision in *Hardee v. Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 256 P.3d 339 (2011), and the three-part due process test created by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d. 18 (1976).

**1. Preponderance Of The Evidence Is The Appropriate Standard In Cases That Do Not Involve Professional Licenses**

The Washington Supreme Court has found that a higher evidentiary standard is appropriate in disciplinary proceedings involving the revocation of professional licenses, such as in *Nguyen v. Dep't of Health Med. Quality Assur. Comm'n*, 144 Wn.2d 516, 29 P.3d 689 (2001), which involved the revocation of a doctor's license to practice medicine. *Id.* at 522. In *Hardee*, however, the Court held that a preponderance of the evidence standard is sufficient for cases that do not involve certain professional licenses. *Hardee*, 172 Wn.2d 1 at 339. The case before this court does not involve the type of professional license where a higher evidentiary standard is necessary.

In *Hardee*, the Supreme Court determined that due process is satisfied by application of the preponderance of the evidence standard in the revocation of a home child care license. *Id.* That decision was based, in part, on a narrow reading of the precedent in *Nguyen*, as well as a determination that a home child care license is more analogous to a license that adheres to a facility, than one that adheres to an individual. In that light, the Supreme Court determined that a child care facility license is more in the nature of an occupational license than a

professional license that would require a higher standard of proof for revocation. *Hardee*, at 172 Wn.2d 1 at 344.

A home child care license and an adult family home license are very similar. Both licenses are site licenses that do not require any particular professional license to obtain them. *See* WAC 388-76-10130 (qualifications for being a provider, entity representative or resident manager of an adult family home). As the preponderance of the evidence satisfies due process for the revocation of a home child care license, it should also satisfy the due process requirements for the revocation of an adult family home license.

**2. The Use Of The Preponderance Of The Evidence Standard Comports With The *Mathews V. Eldridge* Test For Sufficient Due Process**

Ms. Baida bases her due process claim on the argument that the property interest at stake in a adult family home license is of the same value as a professional license. While the Supreme Court has held that the revocation of certain medical licenses supports a higher burden of proof, *Nguyen*, 144 Wn.2d at 524, this evidentiary standard is not applied in all administrative hearings. As *Hardee* demonstrates, cases involving less significant private interests do not necessitate higher burdens of proof. *Hardee*, 172 Wn.2d 1 at 343-44. An application of the three-part due process test created by the United State Supreme

Court in *Mathews* at 424 U.S. 335, further demonstrates that Ms. Baida's due process rights were not violated by use of the preponderance of the evidence standard.

**a. First Factor Of The *Mathews* Test: The Property Interest At Stake Does Not Support A Higher Evidentiary Standard**

To assess a due process claim, courts must first examine the nature of the private interest at stake. *Id.* While fundamental rights require a high evidentiary burden, rights of lesser significance do not require the State to satisfy a burden beyond a preponderance of the evidence. *Hardee*, 172 Wn.2d 1 at 343-44. The *Hardee* court held that, to determine the value of a property interest, a "court must look to objective measures of investment (e.g., time, money, education, etc.) rather than engaging in the hopeless task of weighing the subjective value each individual places on his or her chosen occupation." *Id.* at 347. The Court concluded, in part, that since providers can obtain a child care license with only 20 hours of training (in comparison to the years of education and training required to become a doctor), Hardees's property interest did not give rise to a higher evidentiary burden. *Id.* at 341. Much like the requirements to obtain a child care license, the requirements to obtain an adult family home license are also basic and

include a high school diploma, direct care giving experience, a good moral character, and literacy in English. *See* WAC 388-76-10130.

Ms. Baida does not argue that the qualifications within the adult family home licensing requirements justify her contention that a valuable property interest is implicated. Instead, Ms. Baida references the fact that she is a Licensed Practical Nurse (LPN) to justify her claim that a higher standard should be applied, and she alleges that this adult family home licensing proceeding will negatively impact her LPN license. Brief of Appellant at 13-14. There is no evidence in the administrative record of such an impact to Ms. Baida's LPN credential. The Department does not even regulate LPN licenses and, any attempt to do so, would be handled by a different state agency through a different due process proceeding. The current proceeding is a revocation by the Department of one of Ms. Baida's two adult family home licenses; it is not a disciplinary action through the Department of Health that involves Ms. Baida's LPN credentials. In fact, Ms. Baida does not even need to be an LPN to be an adult family home provider; a high school diploma, or a number of other basic credentials, would suffice. WAC 388-76-10130(2).

Ms. Baida's claim that she has a significant private interest in this licensing proceeding is also based on a complete misreading of the adult

family home law. She mistakenly believes that WAC 388-76-10120(2) applies to this matter so that she will be barred from owning or controlling her present adult family home for 20 years. Brief of Appellant at 11-13. That is not the case. The regulation Ms. Baida cites deals with what occurs when an individual surrenders or relinquishes an adult family home license after receiving notice of an adult family home revocation. This rule implements RCW 70.128.060(10)<sup>5</sup>, which allows a provider to surrender a license in lieu of revocation without instituting an administrative appeal of the revocation, and not admitting any of the violations. If a provider chooses to exercise the option of not pursuing an appeal, and not admitting the violations, there is a statutorily required 20-year bar.

The fact that there is an administrative hearing record in this case reflects that Ms. Baida has not chosen the option of surrendering her license in lieu of revocation. Rather, she is appealing the revocation of her adult family home license. While an eventual revocation may impact her ability to apply for future adult family home licenses, the

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<sup>5</sup> RCW 70.128.060 (10) states: "A provider who receives notification of the department's initiation of a denial, suspension, nonrenewal, or revocation of an adult family home license may, in lieu of appealing the department's action, surrender or relinquish the license. The department shall not issue a new license to or contract with the provider, for the purposes of providing care to vulnerable adults or children, for a period of twenty years following the surrendering or relinquishment of the former license. The licensing record shall indicate that the provider relinquished or surrendered the license, without admitting the violations, after receiving notice of the department's initiation of a denial, suspension, nonrenewal, or revocation of a license."

Department has not revoked her other, current adult family home license, and the administrative record does not demonstrate any intent to do so. *See* WAC 388-76-10125(5), (6).

An adult family home license is similar to a license for a child care facility. As the analysis in *Hardee* demonstrates, the preponderance of the evidence standard is sufficient to protect the private interests of an individual for the type of license that is at issue here. Ms. Baida's interest in any other license she now holds is not implicated.

**b. Second Factor Of The *Mathews* Test: There Are Sufficient Procedural Safeguards**

The second part of the *Mathews* analysis requires courts to “evaluate, not only the risk of erroneous deprivation, but also the ‘probable value, if any, of additional or substitute procedural safeguards[.]’” *Hardee*, 172 Wn.2d 1 at 348 (quoting *Mathews*, 424 U.S. at 335). In order to address this factor, Ms. Baida would have to highlight ways in which “the current procedures . . . suffer from inadequacies that make erroneous deprivations readily foreseeable.” *Hardee* 172 Wn.2d 1 at 345. The only apparent deficiency that she alleges is that there is a two-step review process, where the Board of Appeals review judge is employed by the Department. Ms. Baida claims that the Review Judge's decision to revise the ALJ's decision and

uphold the Department's action was somehow inherently biased. Brief of Appellant at 16-17.<sup>6</sup> Not only is this not reflective of the entire administrative process, it also presumes prejudice merely on the basis that she lost. These bald assertions do not satisfy the second factor of the *Mathews* test, which requires some procedural deficiency that a higher standard of review would address.

The adjudicative proceeding used in adult family home licensing cases already contains the significant procedural safeguards of the administrative hearing process: There has been notice, a full evidentiary hearing under the preponderance of the evidence standard of proof, and subsequent review of that hearing decision. Ms. Baida has also availed herself of judicial review, another procedural safeguard afforded to her. Ms. Baida fails to provide any evidence that a higher standard of proof would have been valuable to her in this case, or how other procedural protections in the administrative process, including superior court review, are not sufficient to address the concern that she now raises. The current procedural safeguards are sufficient under the preponderance of evidence standard of proof.

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<sup>6</sup> Her additional allegations regarding the Review Judge's appearance of fairness are described further below.



**c. Third Factor Of The *Mathews* Test: The Government Has A Significant Interest In Protecting Vulnerable Adults**

The third *Mathews* factor that must be considered is the “[g]overnment’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews*, 424 U.S. at 335. Ms. Baida is incorrect when she states that there is no paramount governmental interest at stake in this case. Brief of the Appellant at 17. The court in *Hardee* held that the State’s interest in protecting children from abuse was paramount, and that a requirement that the State meet a higher evidentiary burden “ignores the reality and the responsibility of the State to protect its most . . . vulnerable residents.” *Hardee*, 172 Wn.2d 1 at 345. The government similarly has a strong interest in protecting vulnerable adults:

One of our government’s most sacred duties is to protect those unable to care for themselves. When balancing the needs of vulnerable adults entrusted to state care and the interests of even well-meaning caregivers who fail to provide necessary and adequate supervision over their charges, DSHS must give priority to the safety of these vulnerable adults.

*Bond v. Dep’t of Soc. & Health Servs.*, 111 Wn. App. 566, 575, 45 P.3d 1087 (2002). The State must be able to regulate individuals entrusted

with the care of vulnerable adults, and since a higher evidentiary burden could hamper these efforts, the lower standard should be applied.

As, Ms. Baida fails to adequately meet any of the factors of the *Mathews* test for a higher evidentiary standard for adult family home revocations, and *Hardee* supports the use of a lower standard of review in this context, there is no basis for overturning the final agency decision on the basis of the Review Judge's use of the preponderance of the evidence standard.

**C. The Department's Review Judge Properly Exercised her Authority**

Ms. Baida makes several allegations regarding the propriety of Review Judge's final agency order. Without challenging any finding of fact, she appears to contend that the Review Judge improperly modified the initial order, and that there are issues with the Review Judge's appearance of fairness. Brief of Appellant at 29-31, 57-58.

**1. The Department's Review Judge is allowed to modify the initial order**

Ms. Baida takes issue with the Review Judge's statements regarding her own authority at AR 91-93, Conclusion of Law 3-6. She specifically questions the Review Judge's authority to revise the initial order, in part, because the findings of fact were "merely recitations of each witness's testimony". Brief of Appellant at 30. She claims that the

Review Judge “makes no sense” and “created a new issue.” *Id.* This claim is a fundamental misunderstanding of the review process and the Final Order.

The Review Judge made the statement regarding the findings of fact being “merely recitations of each witness’s testimony” in the context of explaining that the ALJ made no credibility findings in the initial order, even when evidence conflicted. AR 91. The issue of multiple conflicting findings of fact in the initial order was raised in the Department’s petition to the Board of Appeals for Review. *See e.g.* AR 164-165. To apparently address this issue, the Review Judge made credibility findings. AR 91-92. This was within the Review Judge’s broad authority. A review judge “has the power to make his or her own findings of fact and in the process set aside or modify the findings of the ALJ.” *Kabbae v. Dep’t of Soc. & Servs.*, 144 Wn. App. 432, 442-443, 192 P.3d 903, 908 (2008). Ms. Baida has not challenged any of the findings of fact in the Review Decision and Final Agency Order.

Pursuant to WAC 388-02-0600, the Board of Appeals judge exercises “the same decision-making authority as the ALJ. The review judge considers the entire record and decides the case de novo (anew). In reviewing findings of fact, the review judge must give due regard to the ALJ’s opportunity to observe witnesses.” *Id.* Within the Review

Decision and Final Order, the review judge describes her process for reviewing the initial order; her process was an appropriate exercise of her authority as the review judge. AR 29-30, 91-93. There is no basis for reversal of the agency decision because of the amended findings of fact and conclusions of law.

**2. Ms. Baida Cannot Demonstrate an Issue with the Appearance of Fairness**

Relying on *In re Marriage of Meredith*, 148 Wn. App. 887, 201 P.3d 1056 (2009) and *Skagit County v. Waldal*, 163 Wn. App. 284, 261 P.3d 164 (2011), the appellant also asserts that the comprehensive degree to which the Review Judge rejected and re-wrote the findings of the ALJ necessarily indicates that the Review Judge held a bias against her. Further, she asserts that the appearance of fairness doctrine places upon the Review Judge “an obligation to recuse herself” from this matter. Brief of Appellant at 58. This challenge to the findings of the Review Judge is without substance and should be disregarded.

The appearance of fairness doctrine applies where the judge overseeing a case may have some personal or pecuniary interest that case’s outcome. The test for determining whether the doctrine applies, as stated in *City of Lake Forest Park v. State Shorelines Hearings Bd.*, is: “[Whether] a disinterested person, having been apprised of the

totality of a board member's personal interest in a matter being acted upon, be reasonably justified in thinking that partiality may exist . . . .” 76 Wn. App. 212, 217, 884 P.2d 614 (1994). In other words, the appearance of fairness doctrine concerns itself only with the personal and pecuniary interests of the overseeing judge or judges, and does not allow for the inference of judicial bias based solely on the content of the judge’s ultimate findings. Because the party alleging bias in *Lake Forest Park* could produce no specific evidence of personal or pecuniary interests, “it [had] not described the applicability, much less the violation, of the appearance of fairness doctrine.” *Id* at 217. Ms. Baida finds herself in the same position here: With no personal, particularized evidence upon which to base allegations of bias, she is simply arguing that the Review Judge must have been biased to have ruled against her so extensively.

Further, the cases cited by Ms. Baida in this matter do not support her allegations. Her citation to *Waldal* is particularly inapt, as that case does not concern whether or not a judge should recuse herself, but instead, “what actions a judge may or may not take after recusing.” 163 Wn. App. at 287. As well, the holding of *Meredith* argues strongly against the exact form of allegations of bias that Ms. Baida levels against the Review Judge in this instance: “Here, Meredith was required to

present evidence that the judge who presided over the dissolution proceedings was biased . . . . He did not. Instead, he made bald accusations.” 148 Wn. App. at 903. Ms. Baida cannot muster even the slight amount of material produced in *Meredith*, and her allegations should be given no greater credence.<sup>7</sup>

**D. The Conclusions of Law And The Revocation Of The Adult Family Home License Are Supported By The Administrative Record**

**1. The Findings Of Fact Are Verities On Appeal**

While Ms. Baida questions various conclusions of law in the April 8, 2011, Review Decision and Final Order, she does not contend that the findings of fact in the final agency order are unsupported by the record. Having not assigned error to any of the findings entered, the findings are verities on appeal. *Kitsap Cy. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn. App. 863, 872, 158 P.3d 638, (2007). As the Superior Court recognized, Ms. Baida did not challenge any finding of fact on judicial review. CP 361, 363.

Even if she had somehow properly assigned error to the findings, she cannot meet her burden on appeal of demonstrating that the findings are unsupported by substantial evidence. *See Donahue v. Central*

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<sup>7</sup> “Meredith argued that the judge was biased because she (1) donated money to the Northwest Immigrant Rights Project (NWIRP) and (2) questioned Muriel's immigration attorney about Muriel's deportation status.” *Id* at 903-904.

*Washington University*, 140 Wn. App. 17, 23 (2007) (findings are upheld if supported by substantial evidence). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the matter. *Heinmiller*, 127 Wn.2d at 607. If enough evidence supports the finding, it does not matter that there are conflicting facts in the record or other interpretations of the facts. The reviewing court determines only if the evidence most favorable to the prevailing party reasonably supports the challenged finding. *Dep't of Rev. v. Sec. Pacific Bank*, 109 Wn. App. 795, 803, 38 P.3d 354 (2002); *Sherrel v. Selfors*, 73 Wn. App. 596, 600-01, 871 P.2d 168, *review denied*, 125 Wn.2d 1002 (1994). Therefore, if there is substantial evidence to uphold the revocation of the adult family home license, the Department's action should be upheld. The detailed, 133-page decision and final agency order meets this burden. As the Superior Court's letter ruling recognizes:

The reviewing judge's decision runs to 133 pages accompanied by 646 footnotes most of which are citations to the record in support of the 151 findings of fact and 78 conclusions of law. The Review Decision and Final Order is detailed and comprehensive. The findings of fact are supported by substantial evidence on every citation brought

by the Department. The conclusions of law are in turn supported by the findings.

CP 363.

**2. The Department's Citations Are Supported By The Administrative Record**

Individuals who reside in adult family homes are often totally dependent upon the adult family home. The extreme vulnerability of adult family home residents has led to the development of requirements that are designed to protect and promote the physical, mental, and emotional well-being of residents. Ms. Baida was cited for multiple violations of the legal requirements to be an adult family home operator. She has basically challenged all of the conclusions of law that correlate to these citations. *See* Brief of Appellant at 3-4. As discussed below, all of the citations are supported by the record, and the unchallenged findings of fact.

**a. Overcapacity**

The licensed capacity for Olympic Healthcare II is six people, which is also the maximum number of people allowed for any adult family home. *See* RCW 70.128.010(1). Therefore, Ms. Baida could have six residents in her adult family home, for a total capacity of six residents. Adult family homes must not exceed licensed capacity.



Exceeding the licensed capacity alone is enough to trigger a licensing remedy, like the revocation of a license. Former WAC 388-76-10960(16) (2009).

Capacity is defined as “the maximum number of persons in need of personal or special care permitted in an adult family home at a given time and includes related children or adults in the home who receive personal care or special care and services.” Former WAC 388-76-1000 (2009) (definition of capacity) (Attachment A). Ms. Baida cites to a regulation that discusses how capacity is determined for an adult family home license. Former WAC 388-76-10030 (2008); Brief of Appellant at 20. However, it is undisputed that the capacity number on the license is six residents, which is the maximum number of residents allowed for any adult family home.

What led to the regulatory violation is the actual number of people in need of personal or special care that were discovered in the adult family home when the complaint investigator, and others, were in the Olympic Healthcare II. Testimony from multiple witnesses confirmed that there were more than six, and up to eleven, vulnerable adults in the one home multiple times. The practical problem with this arrangement is, that it indicates that Ms. Baida was insufficiently staffing her two homes. Having so many people needing care or special care in one adult

family home results in the risk that vulnerable adults in need of care and supervision will not get the attention they require.

Ms. Baida basically contends that the residents of Olympic Healthcare I should not count toward the number of residents in Olympic Healthcare II because they were not sleeping at the adult family home and were “visiting”. Brief of Appellant at 20-29. This contention completely ignores the fact that Olympic Healthcare I residents are also vulnerable adults who required 24-hour care and, on multiple occasions, they were receiving that care at an adult family home that was already at full capacity. Furthermore, there were times Olympic Healthcare I residents wanted to return to their adult family home, but were prohibited from doing so because Ms. Baida had not arranged for a caregiver to be there.

The repetitive nature in which Ms. Baida exceeded the licensed capacity in Olympic Healthcare II is especially egregious because she had every reason to know that she could not combine the residents of her two adult family homes without seeking Department permission, and only in rare and special circumstance. Not only was Ms. Baida an experienced adult family home operator, she had previously sought and obtained permission to combine her adult family homes during emergencies when her homes were flooded and evacuated. During those

occasions, there was increased Department monitoring and an understanding that the arrangement was temporary because of the emergent circumstances. AR 33-34, FF 9. As such, Ms. Baida's continual blending of the residents of her two adult family homes can only be seen as insufficient staffing of those homes, and blatant disregard for the limitations inherent in her adult family home licenses.

**b. Failure To Have A Resident Manager**

When an adult family home provider has multiple adult family homes, each home must have one person responsible for managing the overall delivery of care to all residents in the home. WAC 388-76-10036(1). The designated responsible person must be the provider, entity representative, or a qualified resident manager. WAC 388-76-10036 (2). There is no inherent exception to this rule. It is undisputed that there was no resident manager for Olympic Healthcare II from the time that the former resident manger quit until another individual became qualified. The lack of a responsible, qualified person managing the home violates the requirement to have a designated responsible person in Olympic Healthcare II. AR 72, FF 103, 104. No exception to this rule makes sense: The responsibility for managing the overall delivery of care to all residents is ongoing and continual, because the resident's care needs are also ongoing and continual. The only reason a

provider is allowed to have multiple adult family homes is if there is designated responsible person, like a resident manager, to take responsibility for the residents' overall care. By committing to operate two homes, the provider has also committed to this requirement.

Ms. Baida states that the requirement to have a resident manager is unreasonable and absurd because the Department could have granted an exception to the rule to her. Brief of Appellant at 46. It is true that, if there was some emergent reason that she could not obtain a resident manager, Ms. Baida could have communicated with the Department that there was a problem and developed a plan to deal with the situation. Ms. Baida knows communication with the Department in emergent circumstances works; she requested an exception to the capacity requirement when one of her adult family homes was flood damaged. During those occasions, there was increased Department monitoring, and an understanding that the arrangement of combining her two homes was temporary because of the emergent circumstances. AR 71, FF 102. However, when her resident manager quit, Ms. Baida did not attempt to communicate with the Department, and apparently never asked for a temporary exception to the rule. Instead, the Department's complaint investigator caught her without a resident manager and, at the same time, discovered that there were 11 vulnerable adults in one of the provider's

adult family homes. Regardless of whether the Department could have granted an exception to the rule, the record does not show that an exception to this rule was ever requested, and the facts support that there was a violation of the requirement to have a qualified resident manager.

**c. Failure To Have Qualified Staff**

It is undisputed that a caregiver in Olympic Healthcare II, who was sometimes responsible for 11 adult family home residents, did not have current CPR and first aid training. Ms. Baida did not require the caregiver to show her current credentials when she was employed and, only found out after she was cited that the caregiver's credentials were expired. AR 68-70, FF 93-98. Ms. Baida claims that her reliance on what the caregiver told her is enough to satisfy the regulation. Brief of Appellant at 44. This is not the case. WAC 388-76-10135 states that an adult family home must "ensure" that each caregiver has a "current valid" first aid and CPR card. Ms. Baida did not ensure that this occurred—as demonstrated by the fact that one of her staff did not have a current valid CPR and first aid card. The citation for a regulatory violation was proper and supported by the record.

**d. Failure To Have A Resident Assessment**

Adult family home residents must have an assessment prior to being admitted to an adult family home, unless there is an emergency.

WAC 388-76-10395. It is undisputed that Ms. Baida did not have a current assessment of Don when she admitted him as a new resident to Olympic Healthcare II. The assessor could not come to the adult family home until after Ms. Baida had already admitted the resident. AR 66, FF 86. The minimum licensing requirement is that Ms. Baida was required to get an assessment prior to admitting Don, unless there was an emergency. Rather than follow the minimum licensing requirements, Ms. Baida depended on her own experience as a nurse to admit Don. AR 66, FF 87. This does not satisfy minimum licensing requirements. *See* AR 67, FF 88.

Ms. Baida appears to claim that this was an “emergency admission,” however, she does not establish that there was any true emergency. To establish that a true emergency exists, the adult family home must verify that the resident’s life, health or safety is at serious risk due to circumstances in the resident’s current place of residence or harm to the resident has occurred. WAC 388-76-10395(2). Ms. Baida did not establish that such an emergency existed that would have allowed her to violate the minimum licensing requirements.

Ms. Baida asserts that she reasonably believed that an emergency existed because Don would be “homeless.” Brief of Appellant at 40. This is inaccurate and unsupported by the record. There is no evidence

that Don was forced to leave his home or the hospital. Furthermore, there was no showing that Ms. Baida could not have obtained an assessment in the two weeks between when Don's wife viewed Olympic Healthcare II and when he was placed there. There is also no showing that Ms. Baida worked with the hospital discharge planner to manage Don's discharge so that he could be assessed prior to admission. In sum, the Department established that Ms. Baida violated the requirements for admission; she did not establish that she had a legally valid reason for doing so.

**e. Failure To Have Medication Labeled**

It is undisputed that Ms. Baida did not have a medication organizer properly labeled. WAC 388-76-10480. When the complaint investigator told Ms. Baida that one medication organizer was not labeled correctly, she stated she had the label in her office and forgot to put the label on the medication organizer. AR 68, FF 91. She now claims there was no violation of the labeling requirement because caregivers count out the medications and are careful. Brief of Appellant at 42-43.

This interpretation of the labeling requirement is counter to common sense and the purpose of this rule. The medication organizer lacked a proper label for two weeks after the resident was admitted to

the adult family home. AR 68, FF 91. During that time period, multiple staff administered medication and the resident was at greater risk for a medication errors. There is no authority that counting pills substitutes for this requirement. The uncontested findings of fact support this determination.

**f. The Inspection Report Was Not Visible**

Inspection results must be posted in a visible location. WAC 388-76-10585. While there is some dispute as to where the inspection results were posted, it is undisputed that the inspection report was obscured by papers so it could not be seen. Brief of Appellant at 52. Ms. Baida claims that the requirement to have the inspection results in a visible location is satisfied when the location is visible (i.e. the office), not the inspection results. *Id.* This interpretation is nonsensical. As the Review Judge recognized, the purpose of inspection results being in a visible location is so that visitors, family members, and residents can see the inspection results. AR 86, FF 143. To have them buried under paper completely defeats the purpose of the regulation. The citation for a regulatory violation was proper and supported by the record.

**g. There Was Expired And Insufficient  
Emergency Food In The House**

Ms. Baida continues to contest the citation that involves the fact



that there was expired food in Olympic Healthcare II during the inspection. Brief of the Appellant at 49-50. This is a perplexing position for her to take as it was undisputed at hearing that there was expired food in the emergency food supply. AR 83, FF 135. At hearing, no one claimed that the food was not expired. At most, the resident manager claimed that a disgruntled caregiver had brought the expired food into the home. AR 83, FF 136.

The Department's other citation, that there was not enough food on the premises, was also not credibly challenged. AR 80-84, FF 130-138. While there was some testimony that there was plenty of food available for Olympic Healthcare Service II because the food was stored at Olympic Healthcare Service I, this does not address the requirement that the emergency food supply be "on-site." *See* WAC 388-76-10840. The Review Judge's determination that there was not sufficient emergency food on the premises was supported by the record.

**h. There Was Not Sufficient Emergency Lighting**

The adult family home did not have sufficient lighting because there was only one working flashlight in the home. AR 84-85, FF 139-142. The requirement states that there must be "flashlights" for emergency lighting. WAC 388-76-10740.

The initial order overturned this citation claiming that Ms. Baida

could turn her headlights on and shine them into the house for emergency lighting, an argument she now also makes. Brief of the Appellant at 51-52. However, at hearing, Ms. Baida did not claim that the headlights of her car were an option for emergency lighting. This reasoning makes no sense for a variety of reasons. Ms. Baida, and her car, were not always at Olympic Healthcare II. Furthermore, in an emergency, the headlights of the car cannot be used within the rooms of the adult family home to illuminate the rooms for the residents. When looking for emergency lighting, the Department found one working flashlight, and no other emergency lighting was apparent. AR 85, FF 142.<sup>8</sup> The citation is valid.

**i. Negotiated Care Plans**

An adult family home must use the resident assessment and preliminary care plan to develop a written negotiated care plan. The home must ensure each resident's negotiated care plan includes a list of the care and services to be provided, identification of who will provide the care and services, and when and how the care and services will be provided. WAC 388-76-10355(1)-(3).

When the Department's complaint investigator reviewed the

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<sup>8</sup> Ms. Baida makes the assertion that the adult family home had two working flashlights. Brief of Appellant at 51. This statement is unsupported by the undisputed findings of fact that there was one working flashlight. AR 85, FF 139-142.

resident records at Olympic Healthcare II, four of the resident's records revealed no negotiated care plans. AR 72, FF 106. Furthermore, one resident's care plan did not document a swallowing problem, even though his September 17, 2009, assessment documented he had a problem with choking and swallowing and needed supervision and assistance while eating. This omission was especially problematic because he was observed eating his dinner in the living room apart from the other residents who took their meals at the dining room table and he was observed to cough during the meal. The caregiver in the home could not see him while he ate, and apparently did not know that he needed supervision while eating. AR 72-73, FF 107. At hearing, Ms. Baida produced care plans that were supposedly in the home at the time of the complaint investigation. AR 73, FF 109. However, at the time of the complaint investigation, she did not provide these documents to the complaint investigator to review. *Id.*

As the Review Judge noted, because negotiated care plans were not provided to the complaint investigator at the time of the investigation, it is unknown whether the care plans were sufficient at that time, or whether they were later modified. AR 73, FF 109. Furthermore, the Review Judge determined that there were so many discrepancies in the testimony of Ms. Baida and the resident manager,

she found their statements regarding negotiated care plans not credible. *See* AR 72-76, FF 105-115. The citation regarding negotiated care plans is supported by the record.

**j. Care And Services**

There were several care and services issues with various residents in the home. Based on the record at hearing, Ms. Baida failed to ensure that blood glucose testing was done prior to meals, that swallowing issues were properly evaluated, that one resident received needed assistance with brushing her teeth, and that residents received prescribed medication in a timely manner. These citations are supported through the administrative record and the uncontested findings of fact.

Ms. Baida now also indicates for the first time that two of the care and services violations that deal with tooth decay and blood glucose monitoring were not addressed in the adult family home revocation notice. Brief of Appellant at 31 and 34. This is the first time she has raised this issue at any level of review. It is also blatantly false. The revocation notice and the related statement of deficiencies identify a resident's tooth decay and problematic blood glucose monitoring as two of multiple bases for violating the care and services regulation. AR 716, 726-727. This issue was also fully addressed at hearing by both parties, as reflected in the unchallenged findings of fact.

**(1) Teeth Care**

Olga's assessment indicates many care needs related to Alzheimer's dementia, including substantial assistance with personal hygiene, which includes oral care. During the course of the Department's investigation, Olga's dentist, who has cared for her teeth since 2002, stated that, from 2007 to October 2009, dental visits showed a gradual decline in dental care, especially during the past six months. Records indicated she had moderate to heavy plaque build up identified during dental visits in 2007, 2008 and 2009.

During her October 21, 2009 dental visit, Olga had numerous issues with her teeth; heavy plaque build up, her gums were in poor condition, and there was food on her teeth. AR 45, FF 38; AR 56, FF 63. Olga's dentist testified that a certain amount of dental decline is expected as people age. However, a few years ago, the resident's teeth were not in this bad condition, and she needed better oral care. *Id.*

When asked about the condition of Olga's teeth, Ms. Baida claimed that Olga could brush her own teeth, even though that contradicted the dentist and her own caregivers' statements. AR 57, FF 64. Based on the appearance of her teeth during the October 21, 2009, visit to the dentist, she was apparently not receiving proper oral care in

the adult family home prior to that visit.<sup>9</sup> The citation for a regulatory violation for care and services based on improper tooth care was proper and supported by the record.

## **(2) Blood Glucose Monitoring**

John's record contained a physician's order to check his blood glucose level before each meal because checking the blood glucose level after he started eating would result in a false high reading and would not provide his physician with accurate information for managing his diabetes. AR 58, FF 67. On November 13, 2009, the Department's complaint investigator observed a blood glucose level check of John's blood glucose during, not before, the lunch meal. AR 58, FF 68.

In general, John's blood glucose levels were tempestuous; the blood glucose monitoring log showed that his blood glucose levels were sometimes extremely high. AR 59, FF 69. The high results could have been false highs based on when staff checked his blood, or they could have been symptomatic of problems with managing his diabetes. *Id.* Regardless of the high blood glucose levels in John's October 2009 monitoring log, Ms. Baida stated, she had not contacted John's physician

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<sup>9</sup> After the October visit and the subsequent revocation, Olga apparently began receiving better oral care because her teeth improved. AR 57, FF 65.

to report his blood glucose since September 11, 2009.<sup>10</sup> *Id.* As a licensed nurse, Ms. Baida knew that blood glucose results in the 200 and 300 ranges, in consideration of the fact that the resident's insulin had been discontinued, should have been reported to the physician. AR 59-60, FF 70 and 71. The high blood glucose levels could have resulted in diabetic complications such as heart, kidney, and vision problems. AR 59, FF 69. The citation for a regulatory violation was proper and supported by the record.

### **(3) Swallowing Evaluation**

Don was admitted to the adult family home on October 16, 2009. During the complaint investigation, he was observed coughing and having swallowing difficulties during the noon meal. AR 42, FF 30. Both Ms. Baida and another caregiver attempted to feed him and coax him to eat. The noon meal consisted of the type of food that was difficult for a person with swallowing difficulties to eat. AR 63, FF 81.

Ms. Baida was asked if she noticed Don's difficulty swallowing, and if he had been evaluated for a swallowing problem, or for dietary recommendations. She stated she noticed his difficulty, but she had not contacted his physician to discuss her observations of his reluctance to eat. AR 63-65, FF 82 and 83. After the Department's investigation,

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<sup>10</sup> It was also discovered during the hearing that John's problematic blood sugar levels had not been reported to his son. AR 60, FF 73.

Baida apparently contacted the home health agency to request a swallowing evaluation. *Id.* She offered no explanation at hearing for why a swallowing evaluation, or even food recommendations, were not requested earlier. The citation for a regulatory violation for care and services based on this conduct was proper and supported by the record.

**(4) Resident Medication Was Not Accessible  
To Caregivers**

Ms. Baida was cited for failing to ensure that residents had immediate access to narcotic and anti-anxiety medications. This citation is supported in the record. Caregivers reported that Ms. Baida kept the narcotic and anti-anxiety medications separate from the other medications so that residents did not have immediate access to them. AR 60-63, FF 74-80. If a resident wanted or needed a narcotic or anti-anxiety medication, the caregiver had to call Ms. Baida on her cell phone and have her bring the medications to the home, or retrieve them from another location in the home. AR 61, FF 75. Caregivers not having access to certain medications delayed the administration these medications. As a result, a resident suffered unnecessarily from pain. *Id.* The citation for a regulatory violation for care and services based on lack of timely access to medications was proper and supported by the record.



**k. Failure To Understand**

As the Review Judge recognized, the overcapacity issue coupled with the multitude of minimum licensing requirements that were not followed, demonstrate that Ms. Baida failed to understand the need to comply with minimal licensing requirements to ensure the physical and special care needs of vulnerable adults were met. AR 89, FF 150. Simply put, her failure to follow minimum licensing requirements, and to not operate her home overcapacity, resulted in a diminished quality of life and placed residents at risk of harm from unmet physical and supervision needs.

Ms. Baida chose to have adult family home licenses, and in making that choice, she is obligated to follow all of the licensing requirements, all of the time. Her failure to understand and carry out these obligations is one of the reasons the Department revoked her license. As the Review Judge astutely recognized:

The minimum licensing requirements are not goals to which a provider should aspire or strive to attain, but rather they are the absolute minimum threshold that a provider must meet in order to satisfy the licensing requirements for an adult family home.

AR 131, Conclusion of Law 76.

**E. The Department's Revocation And Stop Placement Is Not Arbitrary And Capricious**

The Department's actions in this case are not arbitrary and capricious. The Department considered various options before revoking one of Ms. Baida's two adult family home licenses. *See* AR 47-49, FF 43-45; AR 67-71, Conclusions of Law 67-71. These other options were considered and rejected. Arbitrary and capricious action has been defined as willful and unreasoning action, without consideration and in disregard of facts and circumstances. *Heinmiller*, 127 Wn.2d at 609. Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached. *Id.*

The Review Decision and Final Order sets forth the Department's position in great detail; it has not taken action without consideration, or in disregard of the facts and circumstances. Action taken after giving an ample opportunity to be heard, exercised honestly and upon due consideration, is not arbitrary or capricious, even if it may be believed an erroneous decision has been reached. *Id.* at 609-610.

**F. Fees And Costs**

Ms. Baida requests “fees and costs” pursuant to the Equal Access to Justice Act, but offers no record supporting that she qualifies for fees and costs. Brief of Appellant at 59. RCW 4.84.350 provides:

a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys’ fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

RCW 4.84.350 (emphasis added).

Ms. Baida has not met the threshold issue of demonstrating that she is a “qualified party”<sup>11</sup> that has “prevailed” in a judicial review. A qualified party “prevails” if the party obtains “relief on a significant issue that achieves some benefit” that the party sought in the judicial review proceeding. RCW 4.84.350(1). The statute also expressly limits the payment of attorney’s fees and other expenses to those incurred as a result of prevailing in “a judicial review of an agency action.” RCW 4.84.350(1). Simply because a party prevailed on an issue in the

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<sup>11</sup> RCW 4.84.340(5) defines a “qualified party” to mean (a) an individual with a net worth not exceeding \$1,000,000 when the petition for judicial review is filed; or (b) a sole owner of an unincorporated business, partnership, corporation, association, or organization with a net worth not exceeding \$5,000,000 when the petition for judicial review is filed; or (c) a tax-exempt organization described in Internal Revenue Code § 501(c)(3) (a non-profit religious, charitable, or educational organization); or (d) an agricultural marketing cooperative association as defined in 12 U.S.C. § 1141J(a).

litigation, does not mean that a party is a “prevailing party.” *See e.g., Densley v. Dep’t of Ret. Sys.*, 162 Wn.2d 210, 173 P.3d 885 (2007). Attorneys fees may also be denied because the “agency action” is “substantially justified” or award of fees is “unjust”. RCW 4.84.350(1). Here, regardless of the results of this litigation, the Department’s actions were substantially justified. There is no basis for attorney fees to be awarded.

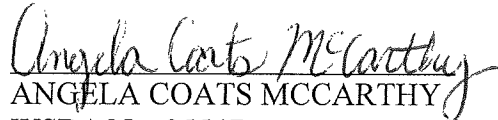
### **III. CONCLUSION**

Ms. Baida’s invitation to apply a higher standard of proof in this case should be rejected. The preponderance of evidence standard is constitutionally appropriate in this case. The Department’s license revocation is supported by the evidence, not arbitrary and capricious, and should be upheld.

For these reasons, this Court should uphold the Department's revocation of the adult family home license for Olympic Healthcare II and affirm the Review Decision and Final Agency Order.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of June, 2012.

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- 388-76-10960 Remedies—Department may impose remedies.  
 388-76-10995 Notice, hearing rights, and effective dates relating to imposition of remedies.  
 388-76-11015 Resident protection program—Disputing a preliminary finding.

**DISPOSITION OF SECTIONS FORMERLY  
 CODIFIED IN THIS CHAPTER**

- 388-76-10785 Water hazards—Enclosures and safety devices. [Statutory Authority: RCW 70.128.040 and chapters 70.128 and 74.34 RCW. 07-21-080, § 388-76-10785, filed 10/16/07, effective 1/1/08.] Repealed by 09-03-030, filed 1/12/09, effective 2/12/09. Statutory Authority: RCW 70.128.040.

**WAC 388-76-10000 Definitions. "Abandonment"** means action or inaction by a person or entity with a duty of care for a frail elder or vulnerable adult that leaves the vulnerable person without the means or ability to obtain necessary food, clothing, shelter, or health care.

**"Abuse"** means the willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult:

(1) In instances of abuse of a vulnerable adult who is unable to express or demonstrate physical harm, pain, or mental anguish, the abuse is presumed to cause physical harm, pain or mental anguish; and

(2) Abuse includes sexual abuse, mental abuse, physical abuse, and exploitation of a vulnerable adult, which have the following meanings:

(a) **"Sexual abuse"** means any form of nonconsensual sexual contact, including but not limited to unwanted or inappropriate touching, rape, sodomy, sexual coercion, sexually explicit photographing, and sexual harassment. Sexual abuse includes any sexual contact between a staff person, who is not also a resident or client, of a facility or a staff person of a program authorized under chapter 71A.12 RCW, and a vulnerable adult living in that facility or receiving service from a program authorized under chapter 71A.12 RCW, whether or not consensual.

(b) **"Physical abuse"** means a willful action of inflicting bodily injury or physical mistreatment. Physical abuse includes, but is not limited to, striking with or without an object, slapping, pinching, choking, kicking, shoving, prodding, or chemical restraints unless the restraints are consistent with licensing requirements, and includes restraints that are otherwise being used inappropriately.

(c) **"Mental abuse"** means any willful action or inaction of mental or verbal abuse. Mental abuse includes, but is not limited to, coercion, harassment, inappropriately isolating a vulnerable adult from family, friends, or regular activity, and verbal assault that includes ridiculing, intimidating, yelling, or swearing.

(d) **"Exploitation"** means an act of forcing, compelling, or exerting undue influence over a vulnerable adult causing the vulnerable adult to act in a way that is inconsistent with relevant past behavior, or causing the vulnerable adult to perform services for the benefit of another.

**"Adult family home"** means:

(1) A residential home in which a person or entity are licensed to provide personal care, special care, room, and board to more than one but not more than six adults who are

not related by blood or marriage to the person or persons providing the services; and

(2) For the purposes of this chapter, any person or entity who has been granted a license to operate an adult family home.

**"Affiliated with an applicant"** means any person listed on the application as a partner, officer, director, resident manager, or majority owner of the applying entity, or is the spouse or domestic partner of the applicant.

**"Applicant"** means an individual, partnership, corporation, or other entity seeking a license to operate an adult family home.

**"Capacity"** means the maximum number of persons in need of personal or special care permitted in an adult family home at a given time and includes related children or adults in the home who receive personal or special care and services.

**"Caregiver"** for purposes other than training, means any person eighteen years of age or older responsible for providing direct personal or special care to a resident and who is not the provider, entity representative, a student or volunteer.

**"Dementia"** is defined as a condition documented through the assessment process required by WAC 388-76-10335.

**"Department"** means the Washington state department of social and health services.

**"Department case manager"** means the department authorized staff person or designee assigned to negotiate, monitor, and facilitate a care and services plan for residents receiving services paid for by the department.

**"Developmental disability"** means:

(1) A person who meets the eligibility criteria defined by the division of developmental disabilities under WAC 388-823-0040; or

(2) A person with a severe, chronic disability which is attributable to cerebral palsy or epilepsy, or any other condition, other than mental illness, found to be closely related to mental retardation which results in impairment of general intellectual functioning or adaptive behavior similar to that of a person with mental retardation, and requires treatment or services similar to those required for these persons (i.e., autism); and

(a) The condition was manifested before the person reached age eighteen;

(b) The condition is likely to continue indefinitely; and

(c) The condition results in substantial functional limitations in three or more of the following areas of major life activities:

- (i) Self-care;
- (ii) Understanding and use of language;
- (iii) Learning;
- (iv) Mobility;
- (v) Self-direction; and
- (vi) Capacity for independent living.

**"Direct supervision"** means oversight by a person who has demonstrated competency in the basic training and specialty training if required, or who has been exempted from the basic training requirements and is:

- (1) On the premises; and
- (2) Quickly and easily available to the caregiver.

**"Domestic partners"** means two adults who meet the requirements for a valid state registered domestic partnership as established by RCW 26.60.030 and who have been issued a certificate of state registered domestic partnership.

**"Entity provider"** means any corporation, partnership, association, or limited liability company that is licensed under this chapter to operate an adult family home.

**"Financial exploitation"** means the illegal or improper use of the property, income, resources, or trust funds of the vulnerable adult by any person for any person's profit or advantage other than for the vulnerable adult's profit or advantage.

**"Entity representative"** means the individual designated by an entity provider who is responsible for the daily operation of the adult family home.

**"Home"** means adult family home.

**"Indirect supervision"** means oversight by a person who:

(1) Has demonstrated competency in the basic training and specialty training if required; or

(2) Has been exempted from the basic training requirements; and

(3) Is quickly and easily available to the care giver, but not necessarily on-site.

**"Inspection"** means a review by department personnel to determine the adult family home's compliance with this chapter and chapters 70.128, 70.129, 74.34 RCW, and other applicable rules and regulations. The department's review may include an on-site visit.

**"Mandated reporter"** means an employee of the department, law enforcement, officer, social worker, professional school personnel, individual provider, an employee of a facility, an employee of a social service, welfare, mental health, adult day health, adult day care, or hospice agency, county coroner or medical examiner, Christian Science practitioner, or health care provider subject to chapter 18.130 RCW. For the purpose of the definition of a mandated reporter, **"Facility"** means a residence licensed or required to be licensed under chapter 18.20 RCW (boarding homes), chapter 18.51 RCW (nursing homes), chapter 70.128 RCW (adult family homes), chapter 72.36 RCW (soldiers' homes), chapter 71A.20 RCW (residential habilitation centers), or any other facility licensed by the department.

**"Medical device"** as used in this chapter, means any piece of medical equipment used to treat a resident's assessed need.

(1) A medical device is not always a restraint and should not be used as a restraint;

(2) Some medical devices have considerable safety risks associated with use; and

(3) Examples of medical devices with known safety risks when used are transfer poles, Posey or lap belts, and side rails.

**"Medication administration"** means giving resident medications by a person legally authorized to do so, such as a physician, pharmacist or nurse.

**"Medication organizer"** is a container with separate compartments for storing oral medications organized in daily doses.

**"Mental illness"** is defined as an Axis I or II diagnosed mental illness as outlined in volume IV of the Diagnostic and

Statistical Manual of Mental Disorders (a copy is available for review through the aging and disability services administration).

**"Multiple facility provider"** means an individual or entity provider who is licensed to operate more than one adult family home.

**"Neglect"** means:

(1) A pattern of conduct or inaction by a person or entity with a duty of care that fails to provide the goods and services that maintain physical or mental health of a vulnerable adult, or that fails to avoid or prevent physical or mental harm or pain to a vulnerable adult; or

(2) An act or omission that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.41.100.

**"Nurse delegation"** means a registered nurse transfers the performance of selected nursing tasks to competent nursing assistants in selected situations. The registered nurse delegating the task retains the responsibility and accountability for the nursing care of the resident.

**"Over-the-counter medication"** is any medication that can be purchased without a prescriptive order, including but not limited to vitamin, mineral, or herbal preparations.

**"Personal care services"** means both physical assistance and/or prompting and supervising the performance of direct personal care tasks as determined by the resident's needs and does not include assistance with tasks performed by a licensed health professional.

**"Physical restraint"** means a manual method, obstacle, or physical or mechanical device, material, or equipment attached or adjacent to the resident's body that restricts freedom of movement or access to his or her body, is used for discipline or convenience, and is not required to treat the resident's medical symptoms.

**"Practitioner"** includes a physician, osteopathic physician, podiatric physician, pharmacist, licensed practical nurse, registered nurse, advanced registered nurse practitioner, dentist, and physician assistant licensed in the state of Washington.

**"Prescribed medication"** refers to any medication (legend drug, controlled substance, and over-the-counter) that is prescribed by an authorized practitioner.

**"Provider"** means any person or entity that is licensed under this chapter to operate an adult family home.

**"Qualified staff"** means a person who:

(1) Is employed, directly or by contract, by an adult family home; and

(2) Meets all of the requirements of a provider, entity representative, resident manager or caregiver.

**"Resident"** means any adult unrelated to the provider who lives in the adult family home and who is in need of care. Except as specified elsewhere in this chapter, for decision-making purposes, the term "resident" includes the resident's surrogate decision maker acting under state law.

**"Resident manager"** means a person employed or designated by the provider or entity representative to manage the adult family home.

**"Significant change" means:**

- (1) A lasting change, decline or improvement in the resident's baseline physical, mental or psychosocial status;
- (2) The change is significant enough so the current assessment and/or negotiated care plan do not reflect the resident's current status; and
- (3) A new assessment may be needed when the resident's condition does not return to baseline within a two week period of time.

**"Special care"** means care beyond personal care services as defined in this section.

**"Staff" means any person who:**

- (1) Is employed, directly or by contract, by an adult family home; and
- (2) Provides care and services to any resident.

**"Unsupervised" means not in the presence of:**

- (1) Another employee or volunteer from the same business or organization; or
- (2) Any relative or guardian of any of the children or developmentally disabled persons or vulnerable adults to which the employee, student or volunteer has access during the course of his or her employment or involvement with the business or organization.

**"Usable floor space"** means resident bedroom floor space exclusive of:

- (1) Toilet rooms;
- (2) Closets;
- (3) Lockers;
- (4) Wardrobes;
- (5) Vestibules; and
- (6) The space required for the door to swing if the bedroom door opens into the resident bedroom.

**"Water hazard"** means any body of water over twenty-four inches in depth that can be accessed by a resident, and includes but not limited to:

- (1) In-ground, above-ground, and on-ground pools;
- (2) Hot tubs, spas;
- (3) Fixed-in-place wading pools;
- (4) Decorative water features;
- (5) Ponds; or
- (6) Natural bodies of water such as streams, lakes, rivers, and oceans.

**"Willful"** means the deliberate or nonaccidental action or inaction by an alleged perpetrator that he/she knew or reasonably should have known could cause a negative outcome, including harm, injury, pain or anguish.

**"Vulnerable adult" includes a person:**

- (1) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself;
- (2) Found incapacitated under chapter 11.88 RCW;
- (3) Who has a developmental disability as defined under RCW 71A.10.020;
- (4) Admitted to any facility;
- (5) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW;
- (6) Receiving services from an individual provider; or
- (7) With a functional disability who lives in his or her own home, who is directing and supervising a paid personal aide to perform a health care task as authorized by RCW 74.39.050.

[2010 WAC Supp.—page 22]

[Statutory Authority: RCW 70.128.040, 09-03-029, § 388-76-10000, filed 1/12/09, effective 2/12/09. Statutory Authority: RCW 70.128.040 and chapters 70.128 and 74.34 RCW, 07-21-080, § 388-76-10000, filed 10/16/07, effective 1/1/08.]

**WAC 388-76-10025 License annual fee.** (1) The adult family home must pay an annual license fee as required in chapter 70.128 RCW.

(2) The home must send the annual license fee to the department upon receipt of notice of fee due.

[Statutory Authority: RCW 70.128.040, 09-21-075, § 388-76-10025, filed 10/16/09, effective 11/16/09. Statutory Authority: RCW 70.128.040 and chapters 70.128 and 74.34 RCW, 07-21-080, § 388-76-10025, filed 10/16/07, effective 1/1/08.]

**WAC 388-76-10036 License requirements—Multiple adult family home management.** When there is more than one home licensed to a provider or entity the adult family home must ensure that:

- (1) Each home has one person responsible for managing the overall delivery of care to all residents in the home;
- (2) The designated responsible person is the provider, entity representative or a qualified resident manager; and
- (3) Each responsible person is designated to manage only one adult family home at a given time.

[Statutory Authority: RCW 70.128.040, 09-03-030, § 388-76-10036, filed 1/12/09, effective 2/12/09.]

**WAC 388-76-10040 License requirements—Qualified person must live-in or be on-site.** (1) The adult family home provider or entity representative must:

- (a) Live in the home; or
- (b) Employ or contract with a qualified resident manager who lives in the home and is responsible for the care and services of each resident at all times.
- (2) The provider, entity representative, or qualified resident manager is exempt from the requirement to live in the home if:
  - (a) The home has twenty-four hour staffing coverage; and
  - (b) A qualified staff person who can make needed decisions is always present in the home.

[Statutory Authority: RCW 70.128.040, 09-03-030, § 388-76-10040, filed 1/12/09, effective 2/12/09. Statutory Authority: RCW 70.128.040 and chapters 70.128 and 74.34 RCW, 07-21-080, § 388-76-10040, filed 10/16/07, effective 1/1/08.]

**WAC 388-76-10070 Application—Fees required.** (1) The applicant must pay all processing and license fees established by chapter 70.128 RCW.

(2) The applicant must submit the required fees with the application form.

(3) The processing fee will be returned as required by chapter 70.128 RCW.

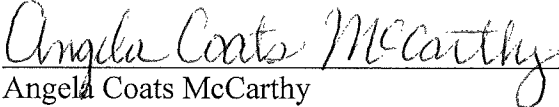
(4) The license fee will be returned to the applicant if the application is withdrawn, voided or the license is denied.

[Statutory Authority: RCW 70.128.040, 09-21-075, § 388-76-10070, filed 10/16/09, effective 11/16/09. Statutory Authority: RCW 70.128.040 and chapters 70.128 and 74.34 RCW, 07-21-080, § 388-76-10070, filed 10/16/07, effective 1/1/08.]



### **CERTIFICATE OF SERVICE**

I certify that I mailed a copy of the foregoing Respondent's Response Brief to Thomas Huber Grimm, Attorney for Appellant, 1201 3<sup>rd</sup> Avenue, Suite 3400, Seattle, WA 98101-3034, via PDF-E-mail and US Postal Service, on June 18, 2012.

  
Angela Coats McCarthy  
Attorney for State of Washington,  
Department of Social and Health Services

# WASHINGTON STATE ATTORNEY GENERAL

**June 18, 2012 - 4:48 PM**

## Transmittal Letter

Document Uploaded: 429926-Respondent's Brief.pdf

Case Name: Olympic Healthcare Servs. II, LLC; Galina Baida v. DSHS

Court of Appeals Case Number: 42992-6

**Is this a Personal Restraint Petition?** Yes ☐ No ☒

### The document being Filed is:

Designation of Clerk's Papers      Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

☒ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Sharon A Paakonen - Email: [sharonp@atg.wa.gov](mailto:sharonp@atg.wa.gov)